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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 243

SOLOMON G. SALOMON,
Petitioner,

v.

THE CITY OF NEW YORK, *et al.*,
Respondents.

REPLY TO BRIEF IN OPPOSITION

SOLOMON G. SALOMON,
Petitioner pro se,
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Woodmere, N. Y.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-3242

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The City of New York *et al.* are hereinafter called respondents.

First

Respondents' introductory statement stating, among other things, that petitioner seeks that Interborough and Manhattan receivers "negotiate with each other and with the City of New York for a lease of Manhattan railroad properties" is palpably not the truth. So is the case of the footnote coupled thereto by asterisk and of the statement as to petitioner's position.

Petitioner's Actual Position and Goal

Petitioner recorded and pleaded his actual position on February 23rd, 1940. See his allegation 64 on pages 20 and 21 of entitled petition, and, as indicated in allegation 65, the files of this Court in 315 U. S. 801 (1942). He then, and ever since, has maintained that the original Manhattan lease could not, and cannot be, disaffirmed because of the Laws of New York and the decision in *Murray* v. *Roberts,* 103 F. (2d) 889. See R. p. 33, allega-

tion 21; p. 34, allegations 27, 31, and 33; and p. 35, allegations 34 and 38; and pp. 19 and 20, allegations 7 to 12 inclusive. See Appendix D, App. 41, also omitted pleadings Appendix F, Allegation VIII, App. 64, and Appendix G, Allegation E, App. 73.

Since the records show petitioner's position is that the original Manhattan lease was never disaffirmed and could not be disaffirmed, it is, manifestly, not the truth that his goal is that Murray and Roberts, or substitutes for them, negotiate for any lease.

As hereinbefore shown, petitioner recorded and pleaded his actual position on February 23rd, 1940. As shown by Appendix D, he has always maintained that the District Court has not performed its duties in respect to that part of the Interborough Estate which is subject to its authority, and which the Court ordered distributed, purportedly temporarily, on account of Interborough bonds, under numerous interim orders issued during eight years; and that it could not do so by turning over the other parts of the Estate to the City. Furthermore, petitioner maintains that the foreclosure of the Manhattan Consolidated Mortgage is without authority and power in equity and law, and must be vacated because it is not a valid conveyance of title of ownership of Manhattan property to Merle-Smith *et al.* and by them to the City. See Reasons Relied on, (b) and (e), Petition, p. 44.

Petitioner's goal is to have the District Court do its duty, and (1) enter an order, fixing, as a matter of record, that the Manhattan Lease could not be, and was not, disaffirmed, and that the obligations of the lease rank as operating expense of the Interborough Estate and prior to service on Interborough bond; (2) order that the rentals actually and necessarily payable under the Manhattan Lease, and impounded by Central Hanover National Bank & Trust Company, must be collected and applied as provided in the lease and in the indenture of the Manhattan Consolidated Mortgage; (3) enforce said collection and application; and

(4) set aside the title of the City to any Manhattan properties granted under the foreclosure of the Consolidated Mortgage, and fix, by record, that vesting of title in the City to any Manhattan property can be lawfully attained only as provided by Sec. 123 of the Public Service Law of the State of New York.

It is not the truth that the legal relations between Interborough and Manhattan or their respective security holders are complex and fully set forth in the two opinions in said footnote; nor is it the truth that the history of said relationship is fully set forth in said opinions.

The legal relationship between the Interborough and Manhattan companies and the respective receivers are those of tenant and landlord, under the undisaffirmed Manhattan Lease. The fact that the lease could not be disaffirmed does not alter such relationship.

The relationship between Interborough and the State and the City is or was somewhat involved; but it is not difficult to understand. Interborough's business was to operate, under state laws and franchises from the State, leased railroads, owned by Manhattan and owned by the City of New York respectively, and connected by railroads which Interborough constructed under franchises to create through routes. The last mentioned franchises exacted, that each of the routes so created must be operated as if it were an original route (Appendix A, App. 6). The required condition precedent to the grant of these franchises (for the connecting railroads and to operate the through routes so created), was that Interborough possess the Manhattan Lease (Appendix A, App. 1). The franchises are mandatory in respect to operation, *Murray* v. *Roberts, supra.*

The franchises granted to Interborough and permitting it to create aforesaid routes, contained the condition that, following taxes, the first payments payable out of the gross revenues of the said routes, were to be the rentals

actually and necessarily payable under the Manhattan lease and those payable for use and occupancy of other properties included in the routes. The City and Interborough wanted Manhattan to consent to the mandatory franchises and Manhattan consented. Therefore it is entitled to the benefit of said condition.

Certainly, at least, the pleadings in *Murray* v. *Roberts,* and the franchises shown to this Court in the record of that case, should be examined for a full exposition of the said legal relationship. The relationships are also dealt with in certain New York cases and in *Gilchrist* v. *I. R. T. Co.* (279 U. S. 159).

Respondents, in the introductory statement, also refer to Judge Hulbert's opinion (R. 38-40) and the order thereon (R. 40). It should be noted, both historically and factually, that Judge Hulbert erroneously cited 10 Fed. Supp., 512 (a decision by Judge Mack in 1935), as having been modified by *Murray* v. *Roberts,* 103 F. (2d) 889. The record on file in this Court in 311 U. S. 720 (1940), will vouch for the fact that it is an unreported decision and order by Judge Patterson in 1938 which was modified. This is also evident from two parts of Appendix B, App. 8-18.

Second

As to Respondents' Argument (1)

Respondents set up false premises for this argument, as false as their statement of petitioner's position and what he seeks. Moreover, they remove the alleged admonition by Judge Hand from its context. The alleged admonition consists of some remarks about the issue of whether continuance of the Manhattan lease would be a burden to the Interborough. Judge Hand remarked that the issue was coupled to a request that the decision in *Murray* v. *Roberts* be delayed until after decision of the issue. Evidently, the decision in *Murray* v. *Roberts* was not delayed as requested, and did not depend on the alleged admonition.

The decision in 103 F. (2d) 889 is that Murray (the Interborough Receiver, and in the last analysis the District Court), must keep the respective franchises which permitted Interborough to build extensions of the Manhattan-owned lines and to construct additional tracks on said lines. These franchises which permitted Interborough to operate the extensions and the additional tracks in conjunction with said lines and parts of City-owned lines as original Interborough routes, Judge Hand said, must be preserved against forfeiture. The mandate commanded that the franchises be preserved, in the absence of other means, by affirmance of the Manhattan Lease. The exact instructions, aside from the aforesaid, were, according to the decision, to be determined in proceedings as to other means than the lease by which Interborough's franchise obligations could be performed by Murray.

Obviously, performance of this command by the higher court was within the authority and power of the District Court. Performance, obviously, would have involved determination of the rights in and to $82,442,562.31 (Appendix F, Allegation VII, App. 64), paid on account of Interborough Bonds, contrary to Roberts' prayers (Manhattan Receiver, custodian of the rights involved), which money included unpaid rentals under undisaffirmed lease (see Mandate, Appendix B, "8", App. 12, and prayers in Appendix C, App. 38). Since said money is part of the Interborough Estate and was not acquired by the City under the Unification Plan, petitioner submits that adjudication of the rights in and to said $82,442,562.31 is an unperformed duty, even if the District Court had jurisdiction of the Unification Plan, question as to which remains unanswered.

Petitioner pins his hopes for adjudication of the rights in and to said money on his "monotonous persistence", which shows his complaint was brought on March 31st,

1933, by Roberts, Manhattan Receiver (Appendix C, App. 19-39), and that the Palmer Committee continued as shown by *Palmer* v. *Guaranty Trust Co.*, (111 F. (2d) 115). See petition p. 19, allegations 57 to 60 inclusive. This Court citing *Cox* v. *Stokes* (156 N. Y. 491, 511), approved similar "monotonous persistence" in *Bogert et al* v. *Southern Pac. Co.* (250 U. S. 483 at 489-490).

Petitioner submits, that his failure to discover the appropriate remedy for his grievance does not constitute laches; and he submits that defendants' rights have not been prejudiced by delay. *Bogert et al* v. *Southern Pac. Co., supra,* p. 490.

Petitioner hopes for allowance of review by this Court because it is evident that the District Court refused to do its duty,—to enter a decree in conformity with the decision in 103 F. (2d) 889 and with the mandate which went down to it, *Pocono Rubber Cloth Co.* v. *J. A. Livingston Inc.* (92 F. (2d) 290, 291). It is also evident that the Circuit Court, by dismissing petitioner's appeal to it, sanctioned such departure and, thereby, itself departed from duty. The departures are contrary to the principle enunciated in *Cohen* v. *Virginia* (6 Wheaton 264, 404), that failure by court to do its duty is in derogation of the Constitution which the court is sworn to uphold. Therefore petitioner believes he could do no less than petition this Court to exercise its powers of supervision in the premises, and for review.

Third

As to Respondents' Argument (2) (a)

Respondents allege that the orders and decrees of the District Court, issued March 15th and June 12th, 1940, in respect to the Unification Plan, underlay the Plan; that these were affirmed in 122 F. (2d) 454; and that petitioner's rights were adjudicated by said orders and decrees.

This Court, by examining page 63 of the Transcript of Record on the appeal in 122 F. (2d) 454, will find that the Unification Plan is there represented to have been erected by the Transit Commission on the foundation of the Public Service Law of New York and the State Constitution, in accordance with same; and, on pages 385-7 thereof, that the Commission ordered and declared the Plan operative on November 22, 1939, pursuant to said law and the terms of the Plan.

It is, therefore, evident that the orders and decrees of the District Court do not underly the Plan. Furthermore, it is evident that, until the questions of authority and power of the District Court over the Plan are answered, it cannot be taken for granted that the Circuit Court did not affirm orders and decrees of the District Court in respect to a contract for acquisition of securities, over which the District Court did not possess authority or power conferred by Law.

Petitioner does not take the position that the District Court could not turn over the Interborough Plan Properties (see Transcript of Record in 122 F. (2d) 454, pp. 72-76), including the "Existing Agreements of the Interborough Company" known as the undisaffirmed Manhattan Lease, via foreclosure of the Interborough Mortgage and Section 123 of the Public Service Law of New York, and in the light of the decision in 111 F. (2d) 115. Petitioner's position is that neither acquisition by the City of securities, nor any orders and decrees in connection therewith, can constitute an adjudication of Manhattan Company's and his rights in and to that part of the Interborough Estate, amounting to $82,442,562.31 (Appendix F, Allegation VII, App. 64) not included in Interborough Plan Properties.

As to Respondents' Argument (2) (b)

This argument amounts to assertion that the District Court could discharge itself from its unperformed duties

as trustee in possession of the Interborough Estate, as Receivership Court, by discharging its agent, the Interborough Receiver.

Petitioner submits it is a truism that no judge or court can divest himself or itself of his or its duties, except by his or its actual discharge of the duties.

It was, and is, beyond doubt, the District Court's duty to fully administer that part of the Interborough Estate amounting to said $82,442,562.31 in accordance with its repeated promises made in the interim orders issued in December 1932 and periodically thereafter (see Appendix F, Allegation 6, I, B. App. 61-62). This duty should be discharged in the light of the decision and mandate in *Murray* v. *Roberts, supra.* The allegedly approved Unification Plan did not contemplate or provide for payment of said money to the City, nor for adjudication by judicial ascertainment of the rights in and to said money; and, obviously, the Plan could not displace the provisions of the said interim orders.

Petitioner's position is that the City was the real owner of the Securities deposited under the Unification Plan; that, since the alleged parties to the so-called compromise represented the deposited securities and since they effectuated such compromise after such deposit, it is apparent that the alleged compromise was made by the City for the City and that, therefore, the compromise is not binding on non-depositors, or on Manhattan Railway Company.

CONCLUSION

Respondents have not presented any good reason why the petition should not be granted.

Respectfully submitted,

SOLOMON G. SALOMON,
Petitioner pro se.